

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

----- In the Matter of -----)
)
MOKULEIA WATER, LLC and)
MOKULEIA WATER USERS ASSOCIATION))
Notice of Failure to Comply With)
the Commission's Laws and Rules;)
Order to Show Cause Why)
Respondents Should Not be)
Assessed a Civil Penalty.)
_____)

DOCKET NO. 05-0009

DECISION AND ORDER NO. 22214

Filed Jan. 11, 2006
At 2:20 o'clock P.M.

Karen Higashi
Chief Clerk of the Commission

DIV. OF CONSUMER ADVOCACY
DEPT. OF COMMERCE AND
CONSUMER AFFAIRS
STATE OF HAWAII

2006 JAN 17 A 8:18

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ATTEST: A True Copy
KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.

K. Higashi

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)
 MOKULEIA WATER, LLC and)
 MOKULEIA WATER USERS ASSOCIATION)
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 Respondents Should Not be)
 Assessed a Civil Penalty.)
)

Decision and Order No. 22214

By this Decision and Order, the commission finds that MOKULEIA WATER, LLC ("Mokuleia Water") is a public utility, as defined by Hawaii Revised Statutes ("HRS") § 269-1, and that Mokuleia Water's transfer of its water distribution system to MOKULEIA WATER USERS ASSOCIATION (the "Association") without commission approval violated HRS § 269-19, and is thus void under HRS § 269-19. As such, the commission orders Mokuleia Water to apply for a certificate of public convenience and necessity ("CPCN"), pursuant to HRS § 269-7.5; and requires Mokuleia Water and its sole member, Metropolitan Mortgage & Securities Co., Inc. ("Metropolitan"), to apply for commission approval to sell Mokuleia Water's assets, pursuant to HRS § 269-19.

I.

Introduction

At issue in this proceeding is whether Mokuleia Water and the Association (collectively, "Respondents") are operating a public utility without a CPCN. By Notice of Violation, Order to Show Cause, and Notice of Hearing filed on January 7, 2005, the commission ordered Mokuleia Water and the Association to show cause why they should not be assessed a civil penalty for failure to comply with HRS Chapter 269.

In July 2002, Mokuleia Water, a Hawaii limited liability company, acquired a water gathering and transmission system on the mountain (mauka) side of Farrington Highway and a water distribution system that serves a portion of the Mokuleia community on the ocean (makai) side of Farrington Highway. Mokuleia Water does not have a CPCN to provide water service to the public.

The following year, on or about July 3, 2003, Mokuleia Water transferred the water distribution portion of its water system to the Association, a Hawaii nonprofit corporation created to acquire and operate the distribution system. Mokuleia Water did not obtain commission approval to transfer its water distribution system assets to the Association.

Without reviewing the activities of entities that are not presently before the commission, the commission finds that Mokuleia Water is a public utility, and that the transfer of its water distribution system to the Association without commission approval, is void. As the transfer from Mokuleia Water to the

Association is void, the commission does not address the issue of whether Mokuleia Water and the Association as presently operated are public utilities under HRS Chapter 269.

II.

Background

A.

History of the Water System

1.

Dillingham Ranch

The core portion of the water system owned by Mokuleia Water was originally installed by the early owners of the Dillingham Ranch lands to serve their ranch and agricultural needs. As neighboring properties were developed, primarily on the ocean or makai side of Farrington Highway, the developers or owners would ask the ranch owner if they could connect to the ranch's water system. The ranch owner accommodated such requests.¹

¹See Respondent Mokuleia Water LLC's Stipulated Facts filed on June 24, 2005, which was signed by Mokuleia Water and the Association ("Mokuleia Water's Stipulated Facts"); Stipulated Facts filed on June 23, 2005, which was signed by Mokuleia Beach Colony and the Association ("Mokuleia Beach Colony's Stipulated Facts").

Sankyo Tsusho Co., Ltd.

In or about March 1987, Sankyo Tsusho Co., Ltd., a Japan corporation doing business under the trade name Mokuleia Land Company ("Sankyo"), acquired the Dillingham agricultural lands together with the water system. Sankyo continued the prior owner's activities in maintaining and operating the potable water system for the benefit of its own agricultural and ranch lands as well as for the benefit of the residents attached to the system in the nearby community. Under Sankyo's ownership and operation of the water system, problems with the water quality and reliability of the system arose and numerous "boil water" notices were sent to end users by Sankyo.²

On November 15, 1994, the commission, acting upon a request by an individual to investigate the Mokuleia Land Company, requested information from Sankyo relating to the provision of water. Sankyo's legal counsel responded to the commission's inquiry on December 30, 1994 ("Sankyo's Letter"), attaching a copy of a 1981 letter from the commission, and indicating that the water system was "essentially the same one

²Mokuleia Water's Stipulated Facts ¶¶ 3-5; Mokuleia Beach Colony's Stipulated Facts ¶¶ 3-5.

that existed when the [commission] previously reviewed this matter in 1981".³

On January 4, 1995, the commission responded to Sankyo's Letter and issued an informal staff opinion: (1) stating that the water system operated by Sankyo was a public utility; and (2) suggesting that Sankyo submit an application for a CPCN, to comply with the requirements of HRS Chapter 269 ("commission's 1995 Letter").⁴ On or about November 7, 1996, the commission confirmed to a rate payer of the Sankyo water system,

³Letter dated December 30, 1994, from Everett S. Kaneshige, Esq. to the commission, at 2.

In 1981, in response to an inquiry by Mokuleia Homesteads, the commission informally opined that Mokuleia Homestead's intention to develop its land and to form a nonprofit association to hold title to sewer and water plants and operate the same for the benefit of its members and the fifty (50) residents who reside outside the proposed development would not constitute a public utility, pursuant to HRS § 269-1 ("commission's 1981 Letter"). The letter was signed by Albert Tom, then Chairman of the commission, and not by a quorum of commissioners. See Hawaii Administrative Rules § 6-61-41(e) (motions that do not involve the final determination of a proceeding may be heard and determined by the chairperson or a commissioner). A majority of the commission constitutes a quorum (i.e., two commissioners). HRS § 269-7(c).

The commission takes administrative notice of all commission records relating to the Respondents and the subject water system, pursuant to HAR § 6-61-48.

⁴The commission's informal opinion letter was signed by Colette H. Gomoto, then legal counsel to the commission, and not by a quorum of commissioners. The commission's letter noted that since the informal opinion provided to the Mokuleia Homesteads in 1981, the Hawaii Supreme Court had provided the commission with additional guidance about the activities that constitute a public utility in In re Wind Power Pacific Investors-III, 67 Haw. 342, 686 P.2d 831 (1984). The commission's letter made it clear that reliance on the commission's 1981 letter would not subject Sankyo to any fines or penalties for failure to comply with HRS Chapter 269.

Marc Rousseau, Esq., that the water system was a public utility, as defined by HRS Chapter 269.⁵

On June 24, 2001, Sankyo, through its legal counsel, advised the community at a North Shore Neighborhood Board meeting that the community had two (2) options for dealing with the water system problems then existing: (1) the system could be dedicated to the Board of Water Supply, City and County of Honolulu ("BWS"), but the residents would have to first provide an estimated \$9 million to upgrade its lines and equipment to BWS standards and construct a three (3)-mile sixteen (16)-inch line to replace its existing main line to connect to the BWS' main line at Mahinaai Street; or (2) the residents could assume management of the water distribution system through a private association and tap into BWS' water supplies by extending the existing eight (8)-inch line to the BWS' main line at Mahinaai Street, at an estimated cost of \$1.5 million.⁶

3.

Mokuleia Water

In June 2002, Metropolitan, a Washington corporation, became interested in acquiring the Mokuleia lands owned by Sankyo through an intermediate buyer named Malani, Inc., a Hawaii corporation ("Malani"). Metropolitan was not interested

⁵Mokuleia Beach Colony's Stipulated Facts ¶ 7.

⁶Mokuleia Water's Stipulated Facts ¶ 7; Mokuleia Beach Colony's Stipulated Facts ¶ 8.

in taking over the entire water system. Sankyo was not willing to sell the real property exclusive of the water system. Sankyo sold the land and water system to Malani on July 31, 2002. That same day, Malani transferred Sankyo's agricultural lands to Metropolitan⁷ and the water system to Mokuleia Water,⁸ an affiliate of Metropolitan.

Mokuleia Water states that following the transfer of the water system from Sankyo to Mokuleia Water (through Malani), it continued to deliver water, but assessed no charges for such services, and "disclaimed any responsibility for the water distribution system or services to the unaffiliated end users located on the makai-side of Farrington Highway."⁹

4.

The Association

The following year, in July 2003, Mokuleia Water transferred the water distribution portion of its water system to the Association, which was formed in May 2003 to acquire and operate the distribution system. Pursuant to the Mokuleia Water Facilities Transfer and Development Agreement,

⁷On or about December 18, 2002, Metropolitan transferred the mauka portions of Mokuleia Ranch including the water well site to Western United Life Assurance Company, its affiliate. See Mokuleia Water's Stipulated Facts ¶ 12; Mokuleia Beach Colony's Stipulated Facts ¶ 13.

⁸Mokuleia Water's Stipulated Facts ¶¶ 8-11; Mokuleia Beach Colony's Stipulated Facts ¶¶ 9-12.

⁹Letter dated June 8, 2004, from Mokuleia Water to the commission, at 4.

dated July 3, 2003, and the Mokuleia Water Facilities Transfer and Assumption Agreement, dated July 3, 2003,¹⁰ Mokuleia Water transferred the water distribution portion of the water system to the Association.¹¹ Pursuant to the Mokuleia Water Facilities Transfer and Development Agreement, Mokuleia Water agreed to:

provide a sufficient quantity of potable water to the Association to supply current and reasonably anticipated water users and the [Dillingham Ranch Water Facilities and the Offsite Water Facilities] at bulk water rates, unless and until the [the Board of Water Supply, City and County of Honolulu ("BWS")] line is extended to serve the Offsite Water Facilities, the extension is placed in service by the BWS, and the extension is able to provide an adequate supply of potable water to the Association, at which time [Mokuleia Water] will have no further obligation to provide water to the Association¹²

As a result of the transfer, Mokuleia Water now owns the water gathering and transmission system, which now consists of a potable water well, pumphouse, series of pumps, water meter, and water delivery lines located on an easement across Dillingham Ranch lands, extending under Farrington Highway, and ending at two (2) bulk water meters and vaults located on two (2)

¹⁰See Exhibits B and C to Statement of Position of Respondent Mokuleia Water Users Association, filed on May 23, 2005 ("Association's Statement of Position").

¹¹Pursuant to the Mokuleia Water Facilities Transfer and Development Agreement, Mokuleia Water provided the Association with \$100,000 to start its operations. See Exhibit B to the Association's Statement of Position at 5.

¹²See Exhibit B to the Association's Statement of Position at 2.

separate properties.¹³ In contrast, the Association owns and operates the water distribution system transferred to it by Mokuleia Water, which consists of all water delivery lines commencing from the outflow side of each bulk meter.¹⁴

The Association supplies water to approximately fifty-six (56) billed customers, three (3) of which are multiple-unit facilities: Camp Mokuleia, Mokuleia Beach Colony, and the Mokuleia Surf Apartments.¹⁵ Pursuant to its bylaws, membership in the Association is open to "all residents living in the Mokuleia, Oahu, Hawaii area, within the proximity of the old Dillingham Ranch water system."¹⁶ The Association "currently has about a dozen members."¹⁷ The rates being charged by the Association to its customers are intended to be the same as that charged by the BWS for comparable services.¹⁸ Average monthly billings by the Association total approximately \$2,400.¹⁹

¹³Statement of Position of Respondent Mokuleia Water, LLC; Exhibits "A" to "E"; and Certificate of Service, filed on May 23, 2005 ("Mokuleia Water's Statement of Position") at 3.

¹⁴Mokuleia Water's Statement of Position at 3.

¹⁵Association's Statement of Position at 8.

¹⁶Id. at 7-8.

¹⁷Id. at 8.

¹⁸Id.

¹⁹Id.

B.

Procedural Background

Sometime after the commission's 1995 Letter, the commission received an informal inquiry regarding the Mokuleia water system. In response, on July 7, 2003, the commission wrote a letter to the Managing Director of Dillingham Ranch, in which it advised Dillingham Ranch that it had not received an application for a CPCN to operate the water system, and requested additional information relating to the system.

On August 22, 2003, Dillingham Ranch Management, LLC responded to the commission's July 7, 2003 letter, indicating that it: (1) conducted the due diligence for the acquisition of Dillingham Ranch from Sankyo; (2) was not aware of the commission's 1995 Letter opining that the system was a public utility subject to commission regulation; and (3) asked the attorney for the Association to respond to the commission's 1995 Letter.

On June 7, 2004, MOKULEIA BEACH COLONY ASSOCIATION ("Complainant"), an association of co-owners of the Mokuleia Beach Colony and one of the multiple-unit facilities served by the Association, lodged an informal complaint against Mokuleia Water and the Association stating that it was "very concerned that public safety is at risk due to the absence of [commission] oversight and regulation" of Mokuleia Water and the Association. In response to the letter, the commission opened informal complaint ("IC") number 04-89 to investigate the merits of Mokuleia Beach Colony's complaint.

On June 7 and 8, 2004, after discussions with commission staff on the matter, the Association and Mokuleia Water filed responses to the commission's July 2003 inquiries.

Thereafter, on July 12, 2004, the commission issued information requests to Mokuleia Water. Mokuleia Water filed its responses to the commission's information requests on November 16, 2004.

C.

Notice of Violation

On January 7, 2005, the commission filed a Notice of Violation, Order to Show Cause, and Notice of Hearing, as Order No. 21531, requiring Respondents to file with the commission statements of position or briefs indicating the reasons why they believe they are not public utilities, as defined by HRS § 269-1, and to appear at the commission's hearing room to show cause why they should not be assessed a civil penalty for failure to comply with the legal requirements set forth in Order No. 21531 ("Show Cause Hearing"). Order No. 21531 also required the Complainant Mokuleia Beach Colony Association to appear at the Show Cause Hearing.

On June 28 and 29, 2005, and July 7, 2005, the Show Cause Hearing was held at the commission hearing room at 465 S. King Street, Room B3, Honolulu, Hawaii 96813. Representatives from and legal counsel for Mokuleia Water, the

Association, and the Complainant provided evidence and arguments at the Show Cause Hearing.

III.

Discussion

A.

Mokuleia Water is a Public Utility

At issue in this proceeding is whether Mokuleia Water and the Association are providing water service to the public as a public utility without a CPCN, in violation of HRS § 269-7.5(a) and, if such a violation is established, whether civil penalties should be imposed upon the Respondents for such violation.²⁰

HRS § 269-1 defines a "public utility" as:

every person who may own, control, operate, or manage as owner, lessee, trustee, receiver, or otherwise, whether under a franchise, charter, license, articles of association, or otherwise, any plant or equipment, or any part thereof, directly or indirectly for public use, for . . . the production, conveyance, transmission, delivery, or furnishing of . . . water

The Hawaii Supreme Court provided further clarification in In re Wind Power Pacific Investors-III, 67 Haw. 342, 686 P.2d 831 (1984), by adopting the following test:

Whether the operator of a given business or enterprise is a public utility depends on whether or not the service rendered by it is of a public

²⁰See Order No. 21531, filed on January 7, 2005 (Notice of Violation, Order to Show Cause, and Notice of Hearing).

character and of public consequence and concern, which is a question necessarily dependent on the facts of the particular case, and the owner or person in control of property becomes a public utility only when and to the extent that his business and property are devoted to a public use. The test is, therefore, whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or to any limited portion of it, as contradistinguished from holding himself out as serving or ready to serve only particular individuals.

Id. at 345 (quoting 73B C.J.S. Public Utilities § 3).

Prior to Mokuleia Water's transfer of its water distribution system to the Association, Mokuleia Water provided water service to the more than fifty (50) end users who were hooked up to its water system. The commission finds that this activity rendered Mokuleia Water "as engaged in the business of supplying [its] product or service to the public, as a class, or to any limited portion of it." See id. Accordingly, prior to transfer of its water distribution system to the Association, Mokuleia Water was a public utility as defined by HRS § 269-1.

Mokuleia Water, however, argues that it did not know that the water system was subject to public utility regulation prior to acquiring the water system. That Mokuleia Water did not conduct sufficient due diligence, or make a simple inquiry to the commission as to the water system's status, does not obviate the fact that the water system is, in fact, a public utility, or that the commission had previously opined in 1995 that the water system was a public utility.

Nor are Mokuleia Water's decision not to charge for water services for a period of time, or its disclaimer of responsibility for the water distribution system, persuasive to the commission that the water service provided was not offered to the public. As commission staff noted in the commission's 1995 Letter, the Court in Wind Power did not carve out exceptions for a business that operated on a not-for-profit basis, or for a system that operated for a number of years without commission oversight.

Based on the foregoing, the commission concludes that prior to Mokuleia Water's transfer of its water distribution system to the Association, Mokuleia Water was a public utility, subject to commission regulation, as defined by HRS § 269-1.

B.

Mokuleia Water's Transfer of the
Water Distribution System to the Association is Void

HRS § 269-19 provides that:

No public utility corporation shall sell, lease, assign, mortgage, or otherwise encumber the whole or part of its road, line, plant, system, or other property necessary or useful in the performance of its duties to the public . . . without first having secured from the public utilities commission an order authorizing it so to do.

HRS § 269-19. Section 269-19 also states: "Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger,

or consolidation, made other than in accordance with the order of the commission shall be void."

As a public utility, Mokuleia Water is required to seek commission approval prior to completing any transfer of property necessary or useful in the performance of its duties to the public. Mokuleia Water, however, failed to receive (or even apply for) commission approval of its July 2003 transfer of the water distribution system to the Association. Therefore, the transfer is void pursuant to HRS § 269-19.

The Association argues that "the prior transfers by Sankyo [should also] be rendered void if the commission determines that the current operations are subject to its jurisdiction."²¹ The commission, however, is limited in this proceeding to the issue of whether Respondents are public utilities and whether they should be assessed civil penalties for the unlawful operation of a water system.²² Sankyo and Malani are not parties to this proceeding. As such, they did not have adequate notice and an opportunity to be heard at a meaningful time and in a meaningful manner in this proceeding, as required by the due process clauses of the fourteenth amendment to the United States Constitution and

²¹Association's Statement of Position at 15.

²²See Order No. 21531, filed on January 7, 2005 (Notice of Violation, Order to Show Cause, and Notice of Hearing).

article I, section 5 of the Hawaii Constitution.²³ Even assuming representatives from Sankyo could be located and had participated, the record is replete with circumstances demonstrating that Sankyo was either not willing or lacked the technical ability to provide its customers with safe, reliable water service. Likewise, Malani, which held the water system for a portion of a day merely to facilitate the transfer of the water system from Sankyo to Mokuleia Water, similarly would not satisfy the commission's criteria for operation of a water system.

Accordingly, the commission finds on the existing record that Mokuleia Water is a public utility and that its transfer of its water distribution system assets to the Association without commission approval violated HRS § 269-19, and is thus void. Mokuleia Water must apply for a CPCN to provide water service to its customers, pursuant to

²³See Price v. Zoning Bd. of Appeals, 77 Haw. 168, 172, 883 P.2d 629, 633 (1994) (citing Sandy Beach Def. Fund v. City Council of the City and County of Honolulu, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989), which held that the "basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner").

HRS § 269-7.5 within 120 days of the filing of this Decision and Order.²⁴

As the transfer from Mokuleia Water to the Association is void, the commission does not address the issue of whether Mokuleia Water and the Association as presently operated are public utilities under HRS Chapter 269.

C.

Civil Penalties

HRS § 269-28 authorizes the commission, after a hearing on the matter, to assess a civil penalty not to exceed \$25,000 for each day of violation, neglect, or failure to conform to or comply with HRS Chapter 269 or any order of the commission.

While the commission is authorized to assess civil penalties for Mokuleia Water's violations of HRS Chapter 269, the commission declines to do so under the circumstances. Mokuleia Water does not appear to have had actual notice of the

²⁴However, the commission acknowledges that in many instances there are advantages to having an unregulated association provide water service to customers, especially where it involves a relatively small customer base and fewer customers among which to distribute fixed costs. The commission further anticipates that the application of established regulatory principles and costs typically allowed recovery by regulated utilities, likely will increase, perhaps significantly, the rates that will be required to be paid by Mokuleia Water's customers. Notwithstanding these challenges, the commission cannot ignore its statutory responsibilities.

commission's 1995 Letter. And, Mokuleia Water has made significant improvements in the water gathering and transmission system during its ownership of the system. Moreover, it appears that additional improvements are necessary before Mokuleia Water's system may be turned over to the BWS. The commission would prefer that Mokuleia Water focus its attention and resources on making necessary improvements to its water system and complying with HRS Chapter 269, rather than paying civil penalties. Accordingly, the commission finds that the public interest would not be served by the imposition of civil penalties upon Mokuleia Water at this time. The commission, however, may impose civil penalties in the event of future violations of HRS Chapter 269.

D.

Pending Sale of Mokuleia Water

On November 22, 2005, the Complainant Mokuleia Beach Colony advised the commission that Mokuleia Water's sole member, Metropolitan, is seeking permission from the bankruptcy court to sell its membership units and interest in, and the assets of, Mokuleia Water to Northshore Water Company, LLC.

As Mokuleia Water is a public utility under HRS § 269-1, it is required to obtain commission approval prior to the sale of any of its assets, pursuant to HRS § 269-19. Accordingly, Metropolitan and Mokuleia Water are required to seek

commission approval of any sale of Metropolitan's membership units or Mokuleia's assets to Northshore Water Company, LLC.

IV.

Orders

THE COMMISSION ORDERS:

1. Mokuleia Water is a public utility, as defined by HRS § 269-1.

2. Mokuleia Water's transfer of the water distribution system to the Association, via the Mokuleia Water Facilities Transfer and Development Agreement, dated July 3, 2003, and the Mokuleia Water Facilities Transfer and Assumption Agreement, dated July 3, 2003, violated HRS § 269-19, and is void.

3. If Mokuleia Water desires to transfer its water distribution assets to the Association, it shall apply for commission approval, pursuant to HRS § 269-19. In addition, if Mokuleia Water's sole member, Metropolitan, desires to sell its membership in or the assets of Mokuleia Water, it shall obtain the commission's approval of the transaction prior to its completion, pursuant to HRS § 269-19.


4. Mokuleia Water must apply for a CPCN to provide water service to its customers, pursuant to HRS § 269-7.5 within 120 days of the filing of this Decision and Order.

5. Mokuleia Water shall conform to the commission's order set forth in paragraphs 3 and 4, above. The failure to

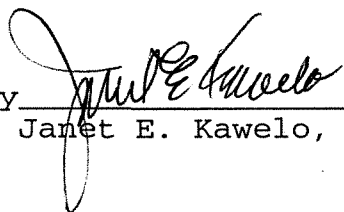
adhere to the commission's order shall constitute cause for the commission to re-open this proceeding, and may result in further regulatory action, including the assessment of civil penalties, as authorized by law.

DONE at Honolulu, Hawaii JAN 11 2006.

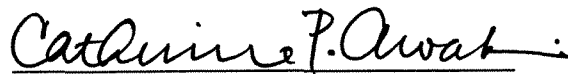
PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By 
Carlito P. Caliboso, Chairman

By (EXCUSED)
Wayne H. Kimura, Commissioner

By 
Janet E. Kawelo, Commissioner

APPROVED AS TO FORM:


Catherine P. Awakuni
Commission Counsel

05-0009.rpr

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 22214 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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DATED: JAN 11 2006